Supreme Court, U.S.
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No. 96-1654

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK J. MUSCARELLO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. In his petition, petitioner Frank J. Muscarello demonstrated: (1) that there is a clear conflict among the courts of appeals with respect to the proper construction of the phrase "carries a firearm" in 18 U.S.C. § 924(c)(1) (Pet. 6-11); (2) that this is a critical and recurring question of federal criminal law (Pet. 11-12); and (3) that the decision of the Fifth Circuit below was plainly wrong (Pet. 12-14). The government does not and cannot dispute either the existence of a conflict or the critical importance of the question (nor does it deny that the present case presents an appropriate vehicle for deciding the issue).[1] The government instead devotes the lion's share of its brief in opposition ("Opp.") to arguing that "[t]he court of appeals in this case correctly determined" the issue (Opp. 5-10), adding at the end that certiorari "is not warranted at this time" because there is a "possibility" that the three courts of appeals that currently apply an "immediate accessability" requirement "might be inclined" to utilize their *en banc* procedures, reverse course, and decide the issue presented in favor of the government. (Opp. 12-13).

As petitioner shows below, all of the government's arguments are erroneous. There is an urgent need for uniformity on this important national issue, and there is no "reasonable possibility" that the conflicting interpretations of § 924(c)(1) will be resolved without this Court's intervention. Certiorari should be granted.

2. The government acknowledges, as it must, that there currently is a substantial conflict among the circuits on this

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[1] The government has also opposed certiorari (on virtually identical grounds) in a similar case filed after the instant petition, *Cleveland v. United States*, No. 96-8837. The present case provides a far superior vehicle for resolving the issue presented than does *Cleveland* because (1) the First Circuit below in *Cleveland* identified, but did not rule upon, a potential jurisdictional bar to petitioner's claim (*see United States v. Cleveland*, 106 F.3d 1056, 1065 (1st Cir.), *pet. for cert. filed*, No. 96-8837 (Apr. 30, 1997)), and (2) the defendant in *Cleveland* unquestionably physically "carried" the firearm to the vehicle on his person in the course of the drug transaction. *Id.* at 1059.

pressing and important issue of federal criminal law. *See* Opp. 10-13. Faced with this square conflict, the government takes the position that, even though the question presented by this case is certworthy at this time, it may become unworthy of certiorari *later* through a series of possible *en banc* rulings. Specifically, the government asks that certiorari be denied because of the "possibility" that four contingencies all conceivably "might" occur to resolve the conflict in the government's favor: (1) the *en banc* Sixth Circuit "might" overturn its settled precedents on § 924(c)(1)'s carry prong and rule in the government's favor; (2) the *en banc* Ninth Circuit "might" do the same; (3) those possible rulings "might," in turn, cause the Second Circuit to grant rehearing *en banc* in a future case raising this issue, even though that court unanimously denied *en banc* review on this identical question less than four months ago (*See* Opp. 12); and (4) the Second Circuit itself "might," in turn, reverse its decade-old position on the issue. Of course, in the interim, the five circuits that currently agree with the government's position must not themselves reverse course *en banc*, and none of the four circuits where the question remains open can rule against the government.[2] While the implausibility of this scenario speaks for itself, petitioner feels obliged not to let it go completely unanswered.

3. Initially, there is no question that the split in the circuits continues unabated. No matter what inferences the government might hope to draw from the Sixth Circuit's *en banc* consideration of this issue, neither the Ninth Circuit nor the Second Circuit has shown the slightest indication that they will abandon the "immediate accessibility" standard. As the government acknowledges (Opp. 12), the Ninth Circuit is considering the

[2] This is far from certain. *See, e.g., United States v. Nelson*, 109 F.3d 1323, 1326 (8th Cir. 1997) ("assum[ing], without deciding, that ready availability of the firearm is required for a 'carry' conviction in this Circuit"); *United States v. Moore*, 104 F.3d 377, 380 (D.C. Cir. 1997) (accepting government's concession that remand on "carry" charge was required where firearm was in engine compartment).

question *en banc* "to reconcile" its ten recent decisions applying the immediate accessibility standard (*see* Pet. App. 14a-15a) with a single, pre-*Bailey* (1979) panel ruling in favor of the government. Nothing suggests that the Ninth Circuit will agree with the government on the merits; indeed, given the unanimity of the Ninth Circuit's post-*Bailey* panel opinions on this issue, it is at best speculative that the *en banc* court will side in favor of the government. Moreover, as is discussed below, the Second Circuit has *refused* to reconsider the issue *en banc*, and it is all but certain that it will not do so in the foreseeable future.

It is essential that this continuing division in the circuits be resolved as soon as practicable — not at some indeterminate date years in the future — in order to ensure fairness in prosecution. Indeed, the United States has stressed that "there is a *pressing need for national uniformity* on this *frequently-litigated issue* because Section 924(c) can carry a mandatory consecutive sentence of up to 30 years, even for first-time offenders." Suggestion of Rehearing *En Banc* at 13, *United States v. Malcuit*, 104 F.3d 880 (6th Cir. 1997) (No. 95-3794) (granted June 11, 1997) (emphasis added). Moreover, as the government has argued, given that "Section 924(c) can carry a mandatory consecutive sentence of as much as 30 years, even for first time offenders, [and that] [r]epeat offenders can receive sentences as long as life imprisonment," "*[a]ny disagreement* among the circuits on the meaning of 'carry' will inevitably cause the sentences for *identically situated* defendants in different parts of the country to differ *radically*." Suggestion of Rehearing *En Banc* at 12-13, *United States v. Foster*, 96 F.3d 1177 (9th Cir. 1996) (No. 89-10405) (granted June 11, 1997) (emphasis added).

4. Since, in the government's view, "any disagreement" among the circuits is intolerable, the government's theory here depends on the willingness of *all* circuits to agree with its construction of § 924(c)(1). But even if the government's speculations come to pass, and the Sixth and Ninth Circuits side with the government *en banc*, there simply is no realistic chance the Second Circuit will grant rehearing *en banc* and reverse its current case law, and therefore no realistic chance that the conflict

will *ever* be resolved without this Court's intervention. Second Circuit precedent on the scope of § 924(c)(1)'s carry prong has been settled for a decade[3] and repeatedly reaffirmed after *Bailey*; seven of its ten active judges have addressed the question, and every single one has voted to apply the "immediate accessibility" standard without dissent.[4] Indeed, when the government sought rehearing *en banc* in *United v. Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996), the suggestion of rehearing *en banc* was not just denied, but denied *without a single judge calling for a response or the taking of a vote*. (*See* App. 1a, *infra*.)

Given these facts, it is a virtual certainty that the Second Circuit will not review this issue *en banc* regardless of what happens in the Sixth and Ninth Circuits. Indeed, in the past twenty years, the Second Circuit has accepted a *total* of only 26 cases for *en banc* review. As former Chief Judge Newman has explained, the Second Circuit's *en banc* practice has one "salient characteristic": "the continuation of an extremely low rate of rehearings in banc." Jon O. Newman, *In Banc Practice in the Second Circuit, 1989-93*, 60 BROOK. L. REV. 491, 491 (1994) [hereinafter *1989-1993 Survey*]. In the most recent period surveyed by Judge Newman, "the Second Circuit reheard in banc only 6 cases, an average of 1.2 cases per year. This figure is considerably lower than the average of 7.65 cases per year for all the federal courts of appeals." *Id.* Since then, the average has

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[3] *See United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996) ("In *United States v. Feliz-Cordero*, 859 F.2d 250 (2d Cir. 1988) . . ., we . . . . stated that 'a person cannot be said to "carry" a firearm without at least a showing that the gun is within reach during the commission of the drug offense.'"), *cert. denied*, 117 S. Ct. 135 (1996).

[4] *Cruz-Rojas*, 101 F.3d 283 (2d Cir. 1996) (Calabresi and Parker, JJ.); *United States v. Collins*, 104 F.3d 354 (table), 1996 WL 658733, at *2-*3 (2d Cir. Nov. 12, 1996) (Meskill, Calabresi, and Cabranes, JJ.); *United States v. Pimentel*, 83 F.3d 55 (2d Cir. 1996) (Newman, C.J., and Kearse, J.); *United States v. Giraldo*, 80 F.3d 667 (Kearse and Walker, JJ.); *United States v. Feliz-Cordero*, 859 F.2d 250 (Winter and Miner, JJ.).

been even lower: one per year.[5] The strikingly low number of *en banc* cases reflects "a view, strongly held by all members of the court, that, in bancs are normally not a wise use of judicial resources." Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 Brook. L. Rev. 355, 369 (1989). Judge Newman has further predicted that even with the changing membership of the Second Circuit, "the pattern that I have observed during the past fifteen years—years in which we have reheard only nineteen cases in banc—will likely continue." *1989-1993 Survey*, *supra*, at 502.

The unanimous acceptance of an "immediate accessibility" requirement by the judges of the Second Circuit virtually guarantees that a subsequent suggestion of rehearing *en banc* would be denied. In the entire two-decade period petitioner has surveyed, the Second Circuit granted *en banc* consideration of a prior ruling when there was no open division within the court only *twice*.[6] Moreover, neither of those cases apparently involved a claim that the court was in the minority of a circuit split. Instead, almost every Second Circuit *en banc* ruling arose from either a divided panel opinion[7] or a panel opinion openly

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[5] The annual number of Second Circuit *en banc* rulings per year after 1993 is: 1994 (0); 1995 (1); 1996 (2); 1997 (1).

[6] *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992) (en banc); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc) (per curiam).

[7] *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978); *Van Gemert v. Boeing*, 590 F.2d 433 (2d Cir. 1978) (en banc), *aff'd*, 444 U.S. 472 (1980); *United States v. Muse*, 633 F.2d 1041 (2d Cir.) (en banc), *cert. denied*, 450 U.S. 984 (1981); *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir.) (en banc), *cert. denied*, 449 U.S. 890 (1980); *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc); *New York v. 11 Cornwell Co.*, 718 F.2d 22 (2d Cir. 1983) (en banc); *United States v.*

calling prior circuit precedent into question.[8] Because neither of

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O'Grady, 742 F.2d 682 (2d Cir. 1984) (en banc); *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238 (2d Cir.) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *United States v. Capo*, 817 F.2d 947 (2d Cir. 1987) (en banc); *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988) (en banc); *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 491 U.S. 600 (1989); *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1119 (1991); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), *cert. denied*, 503 U.S. 1004 (1992); *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992) (en banc), *cert. denied*, 507 U.S. 960 (1993); *In re Extradition of McMullen*, 989 F.2d 603 (2d Cir.) (en banc), *cert. denied*, 510 U.S. 913 (1993); *Pro-Choice Network v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part and rev'd in part*, 117 S. Ct. 855 (1997). In *United States v. Dinapoli*, 8 F.3d 909 (2d Cir. 1993) (en banc), rehearing en banc had been denied at an earlier stage over a published dissent, and was subsequently granted after a ruling by this Court and the panel's third ruling in the case.

[8] *Armstrong v. McAlpin*, 606 F.2d 28, 30 n.1 (2d Cir. 1979) (panel op. of Newman, J.) (calling into question *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (en banc)), *vacated*, 625 F.2d 433 (2d Cir. 1980) (en banc) (overruling *Silver Chrysler*); *Black v. Red Star Towing & Trans. Co.*, 860 F.2d 30 (2d Cir. 1988) (en banc) (overruling *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927)); *Beauford v. Helmsley*, 865 F.2d 1386, 1388 (2d Cir.) (en banc) (noting that "[a] unanimous panel of this Court affirmed the decision of the district court, but suggested that the appeal be 'reheard en banc to clarify Second Circuit law.'" (citation omitted)), *vacated*, 492 U.S. 914 (1989). In the fourth case, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.) (en banc), *cert. denied*, 493 U.S. 811 (1989), *en banc* consideration apparently was granted *sua sponte* so that the case could be considered with *Beauford*, *supra*.

Two other rulings did not arise directly from a panel ruling. *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.) (en banc), *vacated*, 439 U.S. 974 (1978), apparently was never assigned to a panel. In *Fisher v. Vassar College*, No. 94-7737, 1997 WL 310467 (2d Cir. June 5, 1997) (en banc), *en banc* consideration was only granted on a limited issue which

those circumstances is present here, the government's scenario, under which the Second Circuit must both grant rehearing *en banc* and reverse its settled course, is nothing but wishful thinking.

5. Delaying this Court's inevitable ruling on the issue presented will have grave consequences for the Federal judiciary. The government inexplicably believes that it is more appropriate to have dozens of circuit judges consider § 924(c)(1)'s carry prong in the *hope* that this Court will not have to address it as well. Moreover, as the government has previously stressed, "[t]he number of cases affected by a circuit split over this issue will be very great": "much larger than" 250 cases. *See* Suggestion for Rehearing *En Banc* at 13 n.7, *United States v. Foster*, 96 F.3d 1177. If this Court were to accede to the government's request here, and later decide this issue against the government, hundreds of defendants will bring habeas corpus petitions pursuant to 28 U.S.C. § 2255, inundating the courts with collateral attacks on their § 924(c)(1) convictions. This has been the experience of the lower courts after *Bailey*, which "unleashed a flood of § 2255 petitions in the district courts." *United States v. Hillary*, 106 F.3d 1170, 1172 n.1 (4th Cir. 1997). Because further delay will only increase the total number of potential § 2255 claimants, the government's invitation to procrastination has the very real potential to further burden an already overburdened federal judiciary.

Further, the government's theory represents an unprecedented and unsound approach to this Court's certiorari jurisdiction. There is a "possibility" that every circuit split now in existence "might" be resolved by subsequent *en banc* rulings of the courts of appeals. Under the government's approach, this Court would never grant review to resolve a circuit conflict but would simply wait, however long, for the courts of appeals to achieve

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was never addressed by the panel and which was raised within the court only "*[d]uring consideration* of the Petition for Rehearing In Banc." *Id.* at *1 (emphasis added).

unanimity. In fact, the absurdity of such a delaying tactic reaches its height here, where the government hopes for not one, not two, but *three en banc* reversals.

6. With such an extraordinarily weak case for opposing certiorari, and such a firm split among the circuits, it is not surprising that the government devotes only one page in its brief to the issue, arguing instead at some length (Opp. 5-10) that its position is correct on the merits. Petitioner, of course, agrees that the merits of this issue should be addressed by this Court, and stands ready and willing to brief and argue the merits on plenary review. But since the government has seen fit to argue the correctness of the decision below as the principal reason for denying review, petitioner responds in kind.

As petitioner showed in the petition (at 12-14), this Court's decision in *Bailey* teaches that § 924(c)(1) must be interpreted in accordance with "its 'ordinarily or natural' meaning." *Bailey v. United States*, 116 S. Ct. 501, 506 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The government's argument that "to carry an object means to transport it" (Opp. 6) flouts this principle because it focuses in isolation upon the word "carry," instead of the contextual *phrase* of § 924(c)(1) — "carries a firearm." The government urges that "[t]he primary definition of 'carry' in the dictionary includes movement in a vehicle." (Opp. 6). But, as Justices Scalia, Stevens, and Souter have already recognized (as has then-Chief Judge Breyer), the phrase "carries a firearm" is much more limited — *i.e.*, it encompasses not merely "carrying" in any fashion, as the government would have it, but "carrying it in such manner as to be ready for use as a weapon." *Smith*, 508 U.S. at 245-46 (Scalia, J., joined by Stevens and Souter, JJ. dissenting); *see also United States v. McFadden*, 13 F.3d 463, 467 (1st Cir. 1994) (Breyer, J., dissenting).

Finally, "carrying" a firearm must also be interpreted in accord with its "placement and purpose in the statutory scheme," *Bailey*, 116 S. Ct. at 506. In *Bailey*, this Court rejected the government's claim that § 924(c)(1)'s reference to "use" meant

merely "possess." "Had Congress intended possession alone to trigger liability under § 924(c)(1), it easily could have so provided," as evidenced "by the frequent use of the term 'possess' in the gun-crime statutes to describe prohibited gun-related conduct." *Id.* The same is true here. Several of the same sections that the Court cited in *Bailey* criminalize not just "possession," but also "transportation." *E.g.*, 18 U.S.C. §§ 922(g), 922(k). Moreover, § 924 *itself* criminalizes transportation. *See id.* § 924(b) ("Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, . . . ships, *transports*, or receives a firearm or any ammunition in interstate or foreign commerce [commits a crime]." (emphasis added)). The government's "carry equals transport" argument thus fails: Had Congress intended § 924(c)(1) to impose mandatory prison sentences for the transportation of a firearm, "it easily could have so provided." But it clearly did not do so.

* * * *

In sum, the government's argument that certiorari on this concededly important issue "is not warranted at this time" (Opp. 13) is untenable: the conflict is clear and it will not be resolved without this Court's intervention. Further delay in resolving this conflict will only prejudice the federal criminal justice system. Certiorari "at this time" is indeed warranted.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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July 7, 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of March one thousand nine hundred and ninety-seven.

USA
v. Dkt. No: 95-1711
Cruz-Rojas

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee, United States of America.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing *en banc* has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By:/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney